

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL JORDAN YOUNG,

Defendant-Appellant.

UNPUBLISHED

December 23, 2014

No. 317981

Oakland Circuit Court

LC No. 2012-241722-FC

Before: MURRAY, P.J., and SAAD and HOEKSTRA, JJ.

HOEKSTRA, J., (*concurring*).

I concur in the majority's decision to affirm defendant's convictions. However, I write separately because, in my judgment, the prosecutor committed misconduct by manipulating certain photographs for use in a PowerPoint presentation shown during closing arguments. Although I see this conduct as improper, given the overwhelming evidence in this case, I would nonetheless affirm because defendant failed to object to the PowerPoint presentation at trial and he has not met his burden of showing plain error affecting his substantial rights or that defense counsel's failure to object deprived defendant of the effective assistance of counsel.

In this case, during closing arguments the prosecutor made use of a 99 page PowerPoint presentation involving pictures of the victims, witnesses, the crime scene, and other evidence. These photographs were accompanied by bullet points of the prosecutor's argument, as well as arrows or other illustrations designed to connect various photographs and pieces of evidence. On appeal, defendant has challenged several particular slides. Specifically, slides 25 and 26 displayed a photograph of Robert Cipriano's body at the scene of the crime over which a photograph of a blood covered baseball bat had been superimposed. On slide 26, a picture of defendant also appeared and the word "Killer" had been added in typeface across his photograph. Slide 18 displayed another picture of the blood covered bat with the words "murder weapon" written below. Slide 20 showed a photograph of defendant's pants splattered in blood over which photographs of Cipriano and defendant had been superimposed. Photographs of the other victims as they appeared in the hospital were shown on several slides challenged by defendant, namely slides 31, 35, and 45. Lastly, toward the end of the presentation, on slide 93, a photograph of a smiling Cipriano was juxtaposed with a photograph of his blood covered legs where he lay on the kitchen floor.

In considering the propriety of the prosecutor's conduct, it must be remembered that "a prosecutor's role and responsibility is to seek justice and not merely convict." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The prosecutor's conduct is evaluated on a case-by-case basis, considering the entire record and analyzing the prosecutor's remarks in context, to determine whether a defendant was denied a fair and impartial trial. *Id.* Prosecutors are free to argue the evidence and reasonable inferences arising from the evidence, and they are generally given wide latitude in regard to their arguments and conduct at trial. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). For example, a prosecutor may, depending on the circumstances of the case, display admitted exhibits during closing arguments, see, e.g., *People v Coddington*, 188 Mich App 584, 603; 470 NW2d 478 (1991), and the use of visual aids during closing arguments may be appropriate where designed to simplify or summarize complicated evidence. See 6 Am. Jur. Trials 873; *Campbell v Menze Const Co*, 15 Mich App 407, 409; 166 NW2d 624 (1968). Moreover, the prosecutor is not required to confine arguments to the "blandest of all possible terms." *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001) (citation omitted). A prosecutor may not, however, appeal to the jury to sympathize with the victim. *Unger*, 278 Mich App at 237. Likewise, the prosecutor exceeds the bounds of proper argument by mischaracterizing the evidence presented or arguing facts not in evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). See also *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987) ("Closing argument is not the time to introduce new evidence.").

Given the wide latitude typically afforded to prosecutors, as a general matter, I see nothing intrinsically wrong in the use of a PowerPoint presentation as a visual aid during closing arguments when it is used to simplify or summarize complicated evidence for the jury. However, in my judgment, a problem arises when, as part of a PowerPoint presentation, photographs are manipulated in a manner that would arouse the sympathy of the jury. In such circumstances, I believe that the manipulation and alteration of photographs crosses the line from the permissible display of exhibits and the permissible use of visual aids into an improper appeal to juror sympathy and, arguably, the improper presentation of materials not in evidence. In this case, I would conclude that the prosecutor's PowerPoint presentation crossed that line.

For example, I find it particularly troubling that the prosecution altered a photograph of defendant to include the word "killer." Certainly, the prosecutor could argue based on the evidence presented that defendant was a "killer," but no photograph identifying defendant as such was introduced into evidence and the creation of such a photograph is analogous to the improper presentation of new evidence. See *In re Glasmann*, 175 Wash 2d 696, 705-706; 286 P3d 673 (2012) (en banc). Moreover, unlike reasoned oral argument to the effect that the evidence shows a defendant is guilty beyond a reasonable doubt, see, e.g., *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995), the altered photograph instead definitely declared, with all the power of a visual image's tendency to evoke an emotional response, that defendant was a "killer." Cf. *Watters v State*, 129 Nev Adv Op 94; 313 P3d 243, 247-248 (2013). See also *In re Glasmann*, 175 Wash 2d at 708-709 ("[V]isual arguments manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information." (citation omitted)). In this respect, it bears remembering that photographs are powerful tools that can be used in a calculated manner to arouse sympathy and prejudice, and that photographs used merely for this purpose should not be presented to the jury, particularly if they are not

substantially necessary or instructive to show material facts or conditions. See *People v Mills*, 450 Mich 61, 77; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *In re Glasmann*, 175 Wash 2d at 708-709. I view a photograph labeling defendant categorically as a “killer” to be entirely unhelpful to the jury’s understanding of the case and highly likely to arouse the jury’s sympathies or prejudices. For this reason, I cannot sanction the prosecutor’s inclusion of such a photograph in a PowerPoint presentation during closing arguments.

Similarly, I view with disfavor practices such as superimposing one image over another, such as superimposing a photograph of a baseball bat over Cipriano’s body or superimposing photographs of defendant and Cipriano over defendant’s blood covered pants. Certainly, the prosecutor could argue that the baseball bat was the murder weapon or that Cipriano’s blood was found on defendant’s pants, but I find unacceptable supporting this argument through the creation of essentially new images involving the manipulation of exhibits. Such manipulation borders on the improper presentation of new evidence, see *In re Glasmann*, 175 Wash 2d at 705-706, and it poses the risk of unfairly prejudicing defendant. Gruesome photographs undoubtedly have a proper and necessary role in many criminal cases, see *Mills*, 450 Mich at 77-78, but I find unacceptable additional efforts by the prosecutor to increase the power of an image through manipulation, alteration, or theatrical display of the photograph. Thus, in my judgment, photographs used during closing arguments should be confined to the accurate factual representations of the photograph as admitted as exhibits, free from alteration or manipulation by the prosecutor. See generally *id.*

Finally, I can see no reason for the juxtaposition of a photograph depicting Cipriano’s blood covered legs with that of a photograph depicting a smiling Cipriano other than to arouse juror sympathy, which the prosecutor may not do. See *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). I question too whether the repeated presentation of photographs depicting the severely injured victims in the hospital was part of a permissible argument or whether it was an improper effort to appeal to the jurors’ sympathies. Photographs may of course be admitted into evidence when relevant and may be used by the prosecutor to argue his or her theory of the case. But, there is a line between arguing that the injuries depicted support the prosecution’s theory of the case and repeatedly presenting those images to the jury in a manner that garners sympathy for the victims. Cf. *id.* (concluding repeated references to “the poor innocent baby” during closing were intended to elicit an emotional response from the jury). Given the powerful effect photographs may have on their viewers, see *Mills*, 450 Mich 76- 77, I believe prosecutors making use of photographs during closing arguments should recall their obligation to seek justice and scrupulously limit the use of photographs to their proper purpose.

Although in my view there were numerous improprieties in the prosecutor's use of photographs in the course of the PowerPoint presentation, I nonetheless concur in the majority's affirmance of defendant's convictions. Defendant did not offer an objection to the PowerPoint presentation at trial and, given the overwhelming evidence of his guilt, he has not shown any impropriety by the prosecutor affected his substantial rights. See *People v Ericksen*, 288 Mich App 192, 198; 793 NW2d 120 (2010). Given the overwhelming evidence presented, defendant has also not shown that, but for defense counsel's failure to object, there was a reasonable probability of a different outcome. See *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). Consequently, I agree that defendant is not entitled to relief and that his convictions should be affirmed.

/s/ Joel P. Hoekstra